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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1982

No. _____

Ann Cash, T. Smith, C.S. Robinson
Wilson Webber, Charles Watson,
G. Johnson, and David P. Henry.....Petitioners

vs.

City of Little Rock, Arkansas.....Respondent

On Petition for a Writ of Certiorari to
the Arkansas Supreme Court

MOTION FOR LEAVE TO
FILE AMICUS CURIAE BRIEF

AND

BRIEF OF THE PULASKI COUNTY TAX
PAYERS COUNCIL, INC. AS AMICUS CURIAE
IN SUPPORT OF PETITION FOR CERTIORARI

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Attorney for the Amicus
Curiae

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MOTION FOR LEAVE TO FILE AMICUS BRIEF IN
SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Pulaski County Tax Payers Council, Inc. is a non-profit Arkansas corporation organized for the purpose of analysis, education, and support or opposition to tax laws and tax proposals. The Pulaski County Tax Payers Council is concerned about the adverse effects the Arkansas Supreme Court's decision in this action may have on the ability of the organization and its members to retain qualified counsel to prosecute taxpayer class actions. The Pulaski County Tax Payers Council requested the permission of all parties to file its amicus brief. All parties except the respondent City of Little Rock consented to the filing of this amicus brief. The City of Little Rock refused to give its consent. Therefore, the Pulaski County Tax Payers Council moves this Court for leave to file the accompanying amicus brief. The Council

believes that because of its longstanding interest in state and local tax issues, the views expressed in the amicus brief may be of assistance to the Court.

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INTEREST OF THE AMICUS

The Pulaski County Tax Payers Council, Inc. is an Arkansas non-profit corporation organized in 1973 for the purposes of analyzing tax issues, educating the public on questions involving tax laws or tax proposals, and supporting or opposing taxes or tax proposals in accordance with the public's interest in effective and economical government. The Council represents a broad cross-section of the population of the City of Little Rock, Arkansas. In fulfilling its purpose, the Council has actively opposed proposed taxes and tax ballot issues that the Council believed to be illegal or unnecessary. The Council has also supported proposed taxes and tax ballot proposals when the Council believed the new taxes to be lawful and in the public interest. The decision of the Arkansas Supreme Court in this case will directly affect the ability of the Council, its members, and

other taxpayers to challenge illegal local and municipal taxes in the future.

SUMMARY OF ARGUMENT

The Council takes no position regarding the amount of attorneys fee that should be awarded in this action, but the Council is concerned that the Arkansas Supreme Court's decision will deter qualified attorneys from representing taxpayers in future suits to set aside illegal state and local taxes. The Council is also concerned that the Arkansas Supreme Court's expansive treatment of the conflict of interest question will effectively disqualify many, if not most, of the attorneys best qualified to challenge illegal exactions on behalf of taxpayers.

ARGUMENT

Arkansas law expressly authorizes taxpayer class actions to challenge the legality of state and local taxes. Ark. Const. Art. 16, §13. Although attorneys fee awards are not normally permitted by Arkansas law, attorneys

fees are expressly authorized in taxpayer class actions. Ark. Stat. Ann. §84-4601 (Repl. 1980). When attorneys fees are awarded, they are paid out of the refund recovered by the taxpayers; attorneys fees are not assessed as an additional charge against the taxing authority in question. Id.

The authority to award attorneys fees in successful taxpayer suits is critical to the effectiveness of the taxpayer class action as a remedy. Generally speaking, most taxpayers have a relatively small personal stake in the successful outcome of a taxpayers challenge to a state or local tax. For example, the \$1.2 million recovery awarded by the trial court in this case, even if affirmed, would have resulted in an average refund of less than \$25 for each eligible taxpayer. Obviously no taxpayer will be able to pay any meaningful attorneys fee solely on the basis of their personal financial stake in the outcome. Moreover, refunds of illegal exactions are paid by the

taxing authority directly to the taxpayer class members. Therefore, individual taxpayers who actually participate in a taxpayer class action cannot bind the other members of the class to any private fee agreement, contingent or otherwise. In short, the allocation of attorneys fees out of a refund authorized by the statute is the only realistic manner of compensating counsel in an amount commensurate with the effort and expertise required to pursue a taxpayers class action successfully.

There is a body of case law in Arkansas which adequately describes the elements to be considered in determining how much of a refund to allocate as attorneys fees. Typically those considerations look to the attorney's skill, the time expended in prosecuting the action, the size of the refund, and similar factors. See, e.g., Equitable Life Assurance Society v. Rummell, 257 Ark. 90, 514 S.W.2d 224 (1974).

The Arkansas Supreme Court's decision adds a radically new dimension to the law governing attorneys fees in taxpayer class actions. The Arkansas Supreme Court's decision tells attorneys that the fee award in a taxpayers suit may be totally eliminated on appeal without any known standards governing the decision, without any opportunity to argue or present evidence on the subject, and even without any request for such a result by the parties to the action. In short the Arkansas Supreme Court has sent a message to all Arkansas attorneys that the Court may punish them without warning for successfully prosecuting a taxpayers action.

This result inevitably will deter qualified counsel from prosecuting taxpayers class actions. The inability of taxpayers to retain qualified counsel, in turn, will completely emasculate the taxpayers class action as a check and balance against capricious imposition of unlawful state and local taxes. State and

local taxing authorities in Arkansas will soon learn that they need not worry about the legality of a tax because taxpayers will not be able to afford the attorneys fees required to challenge the tax.

The deterrent effect of the Arkansas Supreme Court's decision is not solely financial in nature. The Court's opinion expressly disciplined the taxpayers' attorney, David Henry, for what amounts to an ethical violation. Thus, even if mutually financial terms can be reached between an attorney and potential taxpayer litigants, the attorney must still be concerned that his professional reputation may be opened to unwarranted criticism by the courts and taxing authority if his efforts are too successful.

The prospect of taxing authorities using ethical challenges to deter taxpayers counsel is especially strong in light of the very broad reach that the Arkansas Supreme Court gave to the circumstances that might

constitute disqualifying dual representation. In Arkansas most local and municipal governments do not have full-time in-house counsel. Instead, most Arkansas cities and counties retain attorneys in private practice as their regular legal advisors. In addition, the various state, county, and municipal governmental entities frequently retain a number of other attorneys in private practice for specific items of legal work that are so specialized or time consuming that they are beyond the capabilities of the attorney who regularly represents the governmental entity. This governmental employment of private attorneys is sufficiently extensive that most of the attorneys who have the experience and skill needed to pursue a complex tax challenge successfully also have present or prior attorney-client relationships with a large number of local or municipal entities, either directly or by virtue of association with a firm having such relationships. If the largely

limitless language of the Arkansas Supreme Court regarding dual representations and the "appearance of impropriety" is allowed to stand, there will be few if any attorneys in Arkansas qualified to prosecute a complicated taxpayers class action who will not be disqualified from doing so.

CONCLUSION

For the foregoing reasons the amicus curiae Pulaski County Tax Payers Council, Inc. prays that this Court grant petitioners' petition for writ of certiorari.

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